No. 18-6210

In the Supreme Court of the United States

GERALD P. MITCHELL,

Petitioner,

v.

STATE OF WISCONSIN,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF WISCONSIN

BRIEF OF *AMICI CURIAE* NATIONAL CONFERENCE OF STATE LEGISLATURES, INTERNATIONAL CITY/COUNTY MANAGEMENT ASSOCIATION, INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION, AND NATIONAL DISTRICT ATTORNEYS ASSOCIATION IN SUPPORT OF RESPONDENT

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National Highway Traffic Safety Administration, U.S. Department of Transportation, *Drunk Driving* (2017) 3

National Highway Traffic Safety Administration, U.S. Department of Transportation, *Traffic Safety Facts* (Dec. 2016) 11

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INTEREST OF *AMICI CURIAE*[1]

This case presents the question whether the Fourth Amendment permits implied consent laws to authorize warrantless blood draws from an unconscious impaired driving suspect. *Amici* are organizations that represent the interests of state and local governments, prosecutors, and law enforcement officers, which are the very entities and individuals that enact and enforce these laws. *Amici*'s members rely on implied consent laws like Wisconsin's to protect the public from the scourge of impaired driving. For drivers who are impaired to the point of unconsciousness or incoherence, a warrantless blood draw provides a critical tool in prosecuting and deterring the worst of the impaired driving offenses.

The National Conference of State Legislatures (NCSL) is a bipartisan organization that serves the legislators and staffs of the Nation's 50 States, its Commonwealths, and Territories. NCSL provides research, technical assistance, and opportunities for policymakers to exchange ideas on pressing issues. NCSL advocates for the interests of state governments before Congress and federal agencies,

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[1] No counsel for a party authored this brief in whole or in part, and no person or entity, other than *amici curiae*, their members, and their counsel, made a monetary contribution to the preparation or submission of this brief. Both parties have given their consent to this filing in letters that have been lodged with the Clerk of the Court.

and regularly submits *amicus* briefs in cases, like this one, that raise issues of vital state concern.

The International City/County Management Association (ICMA) is a nonprofit professional and educational organization of over 9,000 appointed chief executives and assistants serving cities, counties, towns, and regional entities. ICMA's mission is to create excellence in local governance by advocating and developing the professional management of local governments throughout the world.

The International Municipal Lawyers Association (IMLA) has been an advocate and resource for local government attorneys since 1935. Owned solely by its more than 2,500 members, IMLA serves as an international clearinghouse for legal information and cooperation on municipal legal matters. IMLA's mission is to advance the responsible development of municipal law through education and advocacy by providing the collective viewpoint of local governments around the country on legal issues before the Supreme Court of the United States, the United States Courts of Appeals, and state supreme and appellate courts.

The National District Attorneys Association is the largest association of prosecuting attorneys in the country, representing 2,500 elected and appointed District Attorneys across the United States, as well as 40,000 Assistant District Attorneys. NDAA provides professional guidance and support, serves as a

resource and education center, and addresses criminal justice issues of national importance.

A decision holding that the implied consent laws at issue are unconstitutional would jeopardize the ability of State and local governments to enforce their public safety laws and prosecute impaired drivers. Given *amici*'s interest in effective strategies for combatting impaired driving, *amici* respectfully submit this brief in support of Respondent Wisconsin.

SUMMARY OF THE ARGUMENT

"Every day, almost 30 people in the United States die in drunk-driving crashes—that's one person every 48 minutes."[2] To curb the frightful carnage inflicted by impaired drivers barreling down public roads, all fifty State legislatures have enacted some version of implied consent laws. Most States provide that drivers impliedly consent to alcohol testing of blood, in particular, by choosing to drive. Most states also make clear that consent endures when a suspected impaired driver is unconscious or incoherent. These State legislatures have made the public policy determination that blood testing of an impaired driver will aid prosecution while lack of testing harms the ability to get convictions and achieve deterrence.

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[2] National Highway Traffic Safety Administration, U.S. Department of Transportation, *Drunk Driving*, (describing drunk-driving fatalities for 2017), https://www.nhtsa.gov/risky-driving/drunk-driving.

Proof of impairment is all the more critical when an impaired driver is unconscious. Indeed, the implied consent laws at issue promote testing of the most dangerous drivers on the road: Most drunk driving deaths are caused by drivers with twice the legal blood alcohol concentration (BAC), which is also the BAC around which blackouts may occur. Similar provisions govern testing for drug-impaired driving, which has become a leading cause of motor vehicle fatalities. When a breath test cannot be administered and speech and conduct cannot be assessed because the impaired driver is unconscious, law enforcement require other means of gathering evidence. Warrantless blood testing of these suspects avoids both jeopardizing blood evidence and delaying the unconscious driver's medical care.

These implied consent laws fall under long-standing exceptions to the Fourth Amendment's warrant requirement, including consent. State laws present a clear and reasonable trade-off. By getting behind the wheel and risking the lives of others on the road, a driver gives her consent to blood testing should law enforcement have probable cause to believe she is driving impaired. The principle of implied consent has been clearly established in State laws for over 50 years, just one of many conditions tied to the privilege of driving. Given these valid state laws and the widespread social expectations around impaired driving, reasonable drivers understand that driving impaired and then falling unconscious may result in blood testing.

No fresh consent is required when law enforcement finds the impaired driving suspect unconscious or incoherent. Petitioner's position requiring the driver to consent on the scene disregards this Court's many decisions recognizing that consent may be implicit, including through the acts of third parties. It is beyond question that consent need not be express when it is reasonably inferred from conduct. And the Court established long ago that "knowledge of a right to refuse is not a prerequisite of voluntary consent." *Schneckloth v. Bustamonte*, 412 U.S. 218, 234 (1973). Petitioner does not argue that he was forced to drive, nor that he actually withdrew his consent, so he cannot now evade the consequences of his voluntary acts.

Exigent circumstances also obviate the need for a warrant for the unconscious impaired driver. The Court in *Missouri v. McNeely* recognized that in "some circumstances . . . the dissipation of alcohol from the bloodstream will support an exigency justifying a properly conducted warrantless blood test." 569 U.S. 141, 153 (2013). *McNeely* held that exigent circumstances are not *per se* established in *all* drunk driving cases. But *McNeely* answered only that specific question—whether exigency exists in *every* drunk driving case. It was presented with no other factors indicating an emergency. The "special facts" here, *id.* at 151—an unconscious drunk driver—take this scenario beyond *McNeely* and show exigency. While *McNeely* observed that every case must be evaluated on the "totality of the circumstances," *id.* at

156, that principle is perfectly compatible with establishing a "general rule for the police to follow" based on commonly "recurring factual situations," *id.* at 168 (Roberts, J., concurring).

With an unconscious driver, a blood test is needed to obtain evidence because less invasive alternatives are unavailable. At the same time, a warrant requirement unreasonably risks delaying medical care. Law enforcement is not well-positioned to detect and assess the medical variables at play when confronted with an unconscious driver—such as whether unconsciousness resulted from other substances, injuries, or medical conditions. The Fourth Amendment does not require police to hazard a guess whether such a seriously impaired driver might be harmed by the extra time and attention needed to seek a warrant. These circumstances implicate both the imminent destruction of evidence and emergency aid exceptions, the latter of which acknowledges that "[t]he need to protect or preserve life or avoid serious injury is justification for what would be otherwise illegal absent an exigency or emergency.'" *Brigham City v. Stuart*, 547 U.S. 398, 403 (2006).

For these same reasons, when faced with an unconscious impaired driving suspect, it is not reasonable, practical, or workable to require law enforcement to seek a warrant for a blood test. This clear rule protects the interests of drivers and the public alike. In a scenario where law enforcement does not necessarily know all the relevant facts, this

rule avoids the choice between potentially delaying care for an unconscious person if a warrant is sought, and losing critical evidence if no warrant is sought or no blood test taken. It also provides State and local governments with the proof they need to punish and deter the most egregious impaired driving offenses. Petitioner offers no basis for invalidating these important State laws. Thus, under the Fourth Amendment's reasonableness touchstone, the lower court's decision should be affirmed. [3]

ARGUMENT

I. THE IMPLIED CONSENT LAWS PERMITTING BLOOD DRAWS FROM UNCONSCIOUS IMPAIRED DRIVING SUSPECTS ARE AN EXCEPTION TO THE FOURTH AMENDMENT'S WARRANT REQUIREMENT.

A. State legislatures enact implied consent laws as an important and permissible public policy response to the threat of impaired driving.

1. There is a high level of consensus among the States that implied consent laws are an important tool in the struggle against impaired driving. All fifty

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[3] *Amici* also agree with Respondent that the blood draw in these circumstances is a reasonable search incident to arrest. Under that exception, a warrant requirement is not reasonable for many of the reasons discussed herein.

States and the federal government require that, by operating a motor vehicle on the public roads, drivers implicitly consent to alcohol testing if they are arrested or detained under suspicion of impaired driving. *See Birchfield v. N. Dakota*, 136 S. Ct. 2160, 2169 (2016); 18 U.S.C. § 3118. The vast majority of States require that drivers on the public roads impliedly consent to *blood* testing, in particular. *See, e.g.*, OHIO REV. CODE ANN. § 4511.191(A)(2); R.I. GEN. LAWS § 31-27-2.1(a); S.D. COD. LAWS § 32-23-10.

Most States specify that unconscious drivers do not "withdraw" their consent for blood alcohol testing. *E.g.*, N.M. STAT. ANN. § 66-8-108 ("Any person who is dead, unconscious or otherwise in a condition rendering him incapable of refusal, shall be deemed not to have withdrawn the consent. . . ."). Indeed, at least thirty-one States have adopted laws that expressly allow warrantless blood draws from unconscious impaired drivers.[4] And otherwise-silent

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[4] ALA. CODE § 32-5-192(b); ALASKA STAT. § 28.35.035(b); ARIZ. REV. STAT. ANN. § 28-1321(C); ARK. CODE ANN. § 5-65-202(b); CAL. VEH. CODE § 23612(a)(5); COLO. REV. STAT. § 42-4-1301.1(8); 21 DEL. CODE ANN. § 2747; FLA. STAT. § 316.1932(1)(c); GA. CODE ANN. § 40-5-55(b); 625 ILL. COMP. STAT. 5/11-501.1(b); IOWA CODE § 321J.7; KY. REV. STAT. ANN. § 189A.103(2); LA REV. STAT. ANN. § 32:661(B); MD. CODE ANN., CTS & JUD. PROC. § 10-305(c); MINN. STAT. § 169A.51(6); MO. REV. STAT. § 577.033; MONT. CODE ANN. 61-8-402(3); NEB. REV. STAT. § 60-6, 200; NEV. REV. STAT. § 484C.160; N.H. REV. STAT. ANN. § 265-A:13; N.M. STAT. ANN. § 66-8-108; OHIO REV. CODE ANN. § 4511.191(A)(4); OKLA. STAT. TIT. 47 § 751(C); ORE. REV. STAT. § 813.140; S.C. CODE ANN. § 56-5-2950 (H); TEX. TRANSP. CODE ANN. § 724.014; UTAH CODE ANN.

implied consent statutes have typically been interpreted to allow warrantless blood draws when the driver is unconscious. *See, e.g.*, *Sims v. State*, 358 P.3d 810, 818 (Idaho Ct. App. 2015) ("[A]lleged unconsciousness does not effectively operate as a withdrawal of his consent."); *Goodman v. Commonwealth*, 558 S.E.2d 555, 560 (Va. Ct. App. 2002) ("incoherence or unconsciousness does not constitute a refusal").

State legislatures thereby present drivers with a common-sense bargain: By choosing to exercise the privilege of driving on public roads in a given State, the driver gives his statutory consent to testing. *See* Robert B. Voas et al., *Implied-Consent Laws: A Review of the Literature and Examination of Current Problems and Related Statutes*, 40 J. Safety Research 77, 78 (2009). That consent remains operative if law enforcement finds that driver unconscious and has probable cause to believe she is guilty of driving impaired.

2. More broadly, implied consent laws represent the considered public policy determination by State legislatures that blood testing of an unconscious impaired driver is critical to protecting the public. State and local governments rely on blood testing evidence to obtain proof they need for convictions of

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§ 41-6A-522; VT. STAT. ANN. TIT. 23 § 1202(a)(2); W. VA. CODE § 17C-5-7(a); WIS. STAT. § 343.305(3)(b); WYO. STAT. ANN. § 31-6-102(c).

unconscious impaired drivers, as the Colorado Supreme Court explained:

> When drivers are unconscious, law enforcement officers are deprived of the evidence they typically rely on in drunk-driving prosecutions: unlike conscious drivers, unconscious drivers cannot perform roadside maneuvers, display speech or conduct indicative of alcohol impairment, or admit to alcohol consumption. In order to effectively combat drunk driving, the state needs some means of gathering evidence to deter and prosecute drunk drivers who wind up unconscious.

People v. Hyde, 393 P.3d 962, 969 (Colo. 2017); *see State of Indiana v. Bisard*, 973 N.E.2d 1229, 1236 (Ind. Ct. App. 2012) ("The implied consent statutes must be read with their global purpose in mind, namely to facilitate collecting evidence of impaired driving.").

Blood testing of unconscious drivers is necessary to remove the most severely impaired drivers from the roads. Warrantless blood tests protect State and local interests by preserving evidence that otherwise would be lost to the natural dissipation of substances in the blood. *Schmerber v. California*, 384 U.S. 757, 770 (1966). This is particularly so when breath tests are unavailable due to the impaired driver's own incapacity. J.A. 110; *cf. Birchfield*, 136 S. Ct. at 2184 (relying on "availability of the less invasive

alternative of a breath test" when requiring warrant for blood test). Testing without delay is crucial not only for obtaining impaired driving convictions but also for proving different types of crimes and degrees of punishment. *See* Pet'r Br. 49-50; *Missouri v. McNeely*, 569 U.S. 141, 167 (2013) (Roberts, J. concurring).

Indeed, severely impaired drivers, including those who drink to the point of unconsciousness, are especially dangerous to themselves and others on the roads: national data shows that over two-thirds of alcohol-impaired driving fatalities involve an impaired driver with a blood alcohol concentration (BAC) of 0.15 or more (about double the usual legal limit).[5] This is also the BAC level around which blackouts may occur.[6] Recognizing the greater dangers of high BAC, many states have enacted laws with enhanced sanctions for drunken driving offenders with a particularly high BAC.[7]

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[5] National Highway Traffic Safety Administration, U.S. Department of Transportation, *Traffic Safety Facts* (Dec. 2016), https://crashstats.nhtsa.dot.gov/Api/Public/ViewPublication/812350

[6] Aaron M. White, Ph.D., *What Happened? Alcohol, Memory Blackouts, and the Brain, Alcohol Research & Health*, 186-96, (2003:27(2)), https://pubs.niaaa.nih.gov/publications/arh27-2/186-196.htm.

[7] National Conference of State Legislatures, *Increased Penalties for High Blood Alcohol Content* (Nov. 14, 2016), http://www.ncsl.org/research/transportation/increased-penalties-for-high-blood-alcohol-content.aspx.

It is not only alcohol that leads to unconscious drivers: the Governors Highway Safety Association (GHSA) found that in 2016, 44% of fatally-injured drivers with known results tested positive for drugs, up from 28% just 10 years prior.[8] Many implied consent laws include similar provisions for drugs, including that consent is not withdrawn by the unconscious drugged driving suspect. Blood draws are often required for drug testing, which typically cannot be accomplished through ordinary breath tests. *E.g.*, COLO. REV. STAT. §§ 42-4-1301.1(2)(b)(I), (8). State and local governments have a paramount interest in enforcing laws against drugged driving, and blood testing is essential to detecting and prosecuting drug-impaired driving.[9] Instances of drivers found unconscious due to opioid overdoses, for example, have become all too familiar. Kristine Phillips, *Another parent's overdose, another child in the back seat: A 'new norm' for drug users?*, WASH. POST, Oct. 28, 2016.[10]

In addition, by recognizing that consent persists when a driver becomes unconscious, State legislatures send the consistent and impactful message that

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[8] Governors Highway Safety Association, *Drug-Impaired Driving: Marijuana and Opioids Raise Critical Issues for States*, 7 (2018), https://www.ghsa.org/sites/default/files/2018-05/GHSA_DrugImpairedDriving_FINAL.pdf ("GHSA Report").

[9] *Id.*, GHSA Report at 25-26, 30-35.

[10] *Available at*, https://www.washingtonpost.com/news/to-your-health/wp/2016/10/27/another-parents-overdose-another-child-in-the-back-seat-a-new-norm-for-drug-users/?utm_term=.c8ff7311322b.

impaired driving is likely to be detected and punished. Such a rule avoids placing unconscious impaired drivers at a perverse advantage over their conscious peers. While conscious drivers may withdraw their consent, they typically face civil penalties for doing so. *See Birchfield*, 136 S. Ct. 2160, 2185. As the Kansas Supreme Court reasoned, allowing an unconscious driver to avoid the implied consent laws "would permit the worst offender, the passed-out drunk, to escape provision of the statute by his own voluntary act." *State v. Garner*, 608 P.2d 1321, 1325 (Kan. 1980).

Clear rules around impaired driving promote State and local interest in deterrence, because "[i]f drivers believe . . . that impaired drivers are likely to be arrested, convicted and punished, many will not drive while impaired by alcohol."[11] Allowing an exception for the most impaired drivers would make that deterrent less clear and less effective. Implied consent laws and associated penalties "serve[] to aid the state in achieving the legitimate goals of removing drunk drivers from the road and imposing proper

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[11] National Highway Traffic Safety Administration, U.S. Department of Transportation, *Countermeasures That Work: A Highway Safety Countermeasures Guide for State Highway Safety Offices*, 1.10, 8th Ed. (2015), https://www.nhtsa.gov/sites/nhtsa.dot.gov/files/documents/812202-countermeasuresthatwork8th.pdf; *see also Birchfield*, 136 S. Ct. at 2179 ("Governments "have a compelling interest in creating effective 'deterrent[s] to drunken driving' so such individuals make responsible decisions and do not become a threat to others in the first place.").

penalties on offenders." *Escarcega v. State ex rel. Wyo. DOT*, 153 P.3d 264, 270 (Wyo. 2007).

B. Implied consent is a well-established exception to the Fourth Amendment's warrant requirement.

1. These implied consent laws are permissible under the Fourth Amendment's consent exception. "It is well established that a search is reasonable when the subject consents." *Birchfield*, 136 S. Ct. at 2185. While sometimes a person consents expressly by word, the Court has also repeatedly recognized the possibility of implicit consent. *See, e.g., Florida v. Jimeno*, 500 U.S. 248 (1991) (consent to car search reasonably understood to imply consent to search a paper bag in front seat); *Frazier v. Cupp*, 394 U.S. 731, 740 (1969) (by sharing bag, petitioner "assumed the risk" the other party would allow a search); *South Dakota v. Neville*, 459 U.S. 553, 559 (1983) (describing South Dakota's "implied consent" law for blood testing of a possibly intoxicated driver); *Stoner v. California*, 376 U.S. 483, 489 (1964) (Fourth Amendment right can be "waive[d] by word or deed").

In accordance with these established principles, consent of a driver on the public roads may be inferred from their conduct and context. As explained above, the law in most States establishes that a person who chooses to drive on the public roads implicitly consents to blood tests for alcohol and other

intoxicating substances—and that consent endures if the driver is unconscious.

These valid state laws provide a robust basis for inferring consent, because they clearly establish the terms on which a person undertakes to drive on the public roads. Laws and regulations regularly require consent to various searches as preconditions for undertaking certain activities or enjoying certain privileges. *See, e.g,. Zap v. United States*, 328 U.S. 624, 626, 630 (1946) (FBI search authorized because contract with the Navy required contractor to open its records for inspection).

State laws mandate consent to a broad range of conditions as a prerequisite to driving on public roads. Among others, a driver is required to carry a copy of her license and produce that physical copy upon a police officer's demand; and a driver is required to produce proof, on demand, of the driver's liability insurance. *E.g.* MICH. C.L. § 257.311; MINN. STAT. § 169.791. Before a car is allowed on the road, the owner must have it inspected to verify it satisfies all the safety requirements, and in some states must submit to an emissions inspection, in which a state inspection facility will operate the car on a dynamometer and also recover electronic data. *E.g.* Wisc. Stat. §§ 110.20, 341.10; *cf. United States v. Jones*, 132 S. Ct. 945, 952 (2012) (attaching a device to a car "encroache[s] on a protected area" and thus constitutes a search). Petitioner rightly does not question the validity of these searches—even though

drivers consent to them only implicitly, and only by virtue of the state laws mandating that they do so.

On the contrary, this principle of implied consent has been commonplace for decades, and state laws providing for implied consent are part of the fabric of custom and social expectations connected to driving. *See Georgia v. Randolph*, 547 U.S. 103, 111 (2006) (observing that shared privacy expectations are "naturally enough influenced by" background law). New York enacted an implied-consent law by 1953, and by 1962, the concept of implied consent had become ordinary enough to be included in the Uniform Vehicle Code. 136 S. Ct. at 2169.

In 1957 the Court described blood testing as "routine in our everyday life," and concluded that a blood test on an unconscious motorist was among States' "reasonable means to make automobile driving less dangerous." *Breithaupt v. Abram*, 352 U.S. 432, 436, 439 (1957).[12] *Breithaupt* observed further that "[i]t might be a fair assumption that a driver on the highways, in obedience to a policy of the State, would consent to have a blood test made as a part of a sensible and civilized system protecting himself as

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[12] To be sure, the Court has also concluded that drawing blood for a test is a search, *Missouri v. McNeely*, 569 U.S. 141, 161, 165 (2013), but *Breithaupt* said nothing to the contrary. At a minimum, *Breithaupt* establishes that by the late 1950s, the notion that driving a car exposes the driver to blood tests was commonplace.

well as other citizens not only from the hazards of the road due to drunken driving." *Id.* at 435 n.2.

This widespread use and acceptance of blood tests for drug and alcohol testing reinforces the inference that a driver consents to blood testing. "The constant element in assessing Fourth Amendment reasonableness in the consent cases . . . is the great significance given to widely shared social expectations." *Randolph*, 547 U.S. at 111. For example, *Jimeno* held that a "general consent to a search of [a] car" includes permission to "consent to search containers within that car." 500 U.S. at 251. That conclusion held, not because the defendant had explicitly authorized a search of containers—he had said nothing on that point—but because the Court assessed how a "reasonable" person would understand a generalized consent to search a car. *Id.* As another example, a defendant might face evidence from a search of her dwelling, conducted in the defendant's absence with express permission solely from another person living there. As the Court has explained, "shared tenancy is understood to include an 'assumption of risk,'" under which the inhabitants of shared quarters "understand"—surely implicitly—"that any one of them may admit visitors." *Randolph*, 547 U.S. at 111.

As these cases establish, express permission is not necessary when it is reasonable to infer consent. Consistent with these principles, implied consent laws reasonably establish that an impaired driver's

consent to a blood test, inferred from her decision to drive, remains operative if she becomes unconscious.

2. Of course, a state law establishing implied consent to a search must be reasonable. Accordingly, the Court need not fear the specter that petitioner raises, that there is "no evident limiting principle" and States could legislate consent to any and every sort of search. Pet'r Br. 31; *id.* 32 (worrying a legislature might decree that use of phone lines constitutes consent "to search the contents of all communications thus conducted"). The Court has already described the relevant limits: a condition on driving must "have a nexus to the privilege of driving and entail penalties that are proportiona[te]." 136 S. Ct. 2160, 2186 (2016) (internal quotation marks omitted). The state laws requiring that a driver consent to blood tests are manifestly reasonable in that sense. Petitioner makes no argument to the contrary. Petitioner instead argues that blood draws are *per se* unreasonable because they are inherently too intrusive, Pet'r Br. 38, but *Breithaupt* disposed of that complaint decades ago, 352 U.S. at 437-39 ("The blood test procedure has become routine in our everyday life.").

In addition, as *Schneckloth v. Bustamante* explained, consent must be "the product of an essentially free and unconstrained choice." 412 U.S. 218, 225 (1973). Petitioner's choice was free and unconstrained: He chose to enter his van and drive it to Lake Michigan. *See* Pet'r Br. 3-4. Given the state law specifying that a person consents to a blood test by driving a vehicle, petitioner's actions constituted

his consent to that search. *Cf. Stoner*, 376 U.S. at 489 (consent can be "by word or deed").

Petitioner does not suggest he suffered any coercion or duress in his choice to drive. Instead, he attempts to evade state law by arguing Wisconsin cannot show consent unless "'all the surrounding circumstances' justif[y] that conclusion." Pet'r Br. 25 (quoting *Schneckloth*, 412 U.S. at 226). Since it would be nearly impossible to show petitioner knew about Wisconsin's implied-consent law, it supposedly follows that the State cannot rely on it as a source of consent. *Id.* But this theory depends on a serious misreading of *Schneckloth*. Prior to the Court's decision, lower courts had developed a number of fixed rules about consent, such as a notion that consent to a search must be "knowing and intelligent," and that consent is invalid unless a person knew she had a right to refuse a search. 412 U.S. at 233-36. The "all the surrounding circumstances" phrase simply corrected these misconceptions by establishing there is no across-the-board legal prerequisite to a "free and unconstrained choice." *See id.* 232-33 (rejecting proposition "that proof of knowledge of the right to refuse consent is a necessary prerequisite to demonstrating a 'voluntary' consent").

Yet petitioner takes *Schneckloth* to have erected its own prerequisites: he says Wisconsin must "show, at a minimum, that individuals . . . are aware of the implied-consent statute and . . . that they understand that driving signifies consent." Pet'r Br. 25. *Contra Schneckloth*, 412 U.S. at 246 ("[N]othing . . . justifies,

much less compels, the easy equation of a knowing waiver with a consent search."). Arguments like this turn *Schneckloth* on its head. In truth, nothing in *Schneckloth* precludes recognizing that when a driver has become unconscious before the blood draw, the consent she provided by driving still persists. When a State has mandated consent as a prerequisite to driving, the most important circumstances under *Schneckloth* are that the defendant made an unforced decision to drive, and then did not withdraw consent at the time of the blood draw.

3. Finally, and fundamentally, petitioner essentially denies that implicit consent to a search is even possible; petitioner insists that "the driver's consent *at the scene* must be voluntary." Pet'r Br. 20 (emphasis added). That sort of consent would not be implicit at all. For that reason, petitioner's claim is contrary to *Birchfield*, *McNeely*, and *Neville*, as well as to the host of cases in which this Court has recognized implicit consent through the acts of third parties.

The Court has long held that another resident of shared living quarters can consent to a search that covers the defendant's belongings. *See Randolph*, 547 U.S. at 110-112 (explaining that "shared tenancy is understood to include an 'assumption of risk'"). *Randolph* held that a defendant can reject a search if he is present at the time of the search and says no, *id.* at 112-13; but the Court reaffirmed that otherwise, a co-tenant's permission for a search is sufficient, *id.* at 121-22. On petitioner's theory, the defendant would

have to be present "at the scene"; but according to this Court's cases, the defendant implicitly consents by operation of "customary social usage," *see id.* at 121. In *Frazier*, an absent defendant "assumed the risk" of a search by "allowing Rawls to use the bag and in leaving it at his house." 394 U.S. at 740. That previous, implicit acceptance was adequate, without any need for the defendant to be present to provide contemporaneous voluntary consent.

The notion that a driver must freshly consent when the police want to draw blood would render meaningless the implied-consent laws that this Court has repeatedly endorsed. *Birchfield*, *McNeely*, and *Neville* all "refer[] approvingly to the general concept of implied-consent laws that impose civil penalties . . . on motorists who refuse to comply." 136 S. Ct. 2160, 2185 (citing 133 S. Ct. 1552; 103 S. Ct. 916). The very notion of civil penalties for refusing a test presupposes that a driver previously provided consent, by enjoying the privilege of driving *before* the incident. Otherwise a State would simply be punishing a person for asserting his Fourth Amendment rights.

C. Exigent circumstances justify a warrantless blood draw from an unconscious drunk driving suspect.

There are two other grounds for upholding the constitutionality of the implied consent laws at issue here. First, Amici agree with Respondent that the warrantless blood test of an unconscious drunk

driving suspect is a reasonable search incident to arrest. Resp. Br. 55-58. Second, for many of the reasons described above, the exigent circumstances exception applies when an impaired driving suspect is unconscious. In those special circumstances, "the exigencies of the situation make the needs of law enforcement so compelling that a warrantless search is objectively reasonable under the Fourth Amendment." *Kentucky v. King*, 563 U.S. 452, 460 (2011).

McNeely considered whether dissipation of alcohol in the blood is "a *per se* exigency that justifies an exception to the Fourth Amendment's warrant requirement for nonconsensual blood testing in *all* drunk-driving cases." *McNeely*, 569 U.S. at 145 (second emphasis added). Declining to adopt the "the broad proposition" that all drunk-driving cases "present a *per se* exigency," the Court held that natural dissipation of alcohol in the bloodstream does not constitute an exigency *in every case*." *Id.* at 165 (emphasis added). The Court expressly limited its holding to that "sole argument presented to us," *id.*—an across-the-board rule allowing a warrantless blood draw of every suspected drunk driver.

At the same time, *McNeely* acknowledged that "the metabolization of alcohol in the bloodstream and the ensuing loss of evidence are among the factors that must be considered in deciding whether a warrant is required." *Id.* Notably, in *McNeely*, there were no "other factors that would suggest [the officer] faced an emergency." *Id.* at 163. However, the Court regularly

considers whether particular facts and circumstances make a warrant requirement unduly burdensome. *Schmerber*, 384 U.S. at 771; *McNeely*, 569 U.S. at 150-51. This case presents "special facts" such as were absent in *McNeely*—namely, an unconscious drunk driving suspect. *Id.* at 150-151.

Where the impaired driver is unconscious, exigency is established by the confluence of two settled exceptions: the imminent destruction of evidence, and the need to provide emergency medical assistance. It is well-established that the "concern for preserving evidence or preventing its loss readily encompasses the inevitable metabolization of alcohol in the blood." *Birchfield*, 136 S. Ct. at 2182. In *Schmerber v. California*, the Court approved a warrantless blood test of a drunk driver because the officer "might reasonably have believed that he was confronted with an emergency, in which the delay necessary to obtain a warrant, under the circumstances, threatened 'the destruction of evidence.'" 384 U.S. 757, 770. The Court has since recognized (in *McNeely*, no less) that in "some circumstances . . . the dissipation of alcohol from the bloodstream will support an exigency justifying a properly conducted warrantless blood test." *McNeely*, 569 U.S. at 153.

Also relevant here, the emergency aid exception permits a warrantless search because "[t]he need to protect or preserve life or avoid serious injury is justification for what would be otherwise illegal absent an exigency or emergency.'" *Brigham City v.*

Stuart, 547 U.S. 398, 403 (2006) (quoting *Mincey v. Arizona*, 437 U.S. 385, 392 (1978)). A warrantless search is allowed "to assist persons who are seriously injured or threatened with such injury." *Brigham City v. Stuart*, 547 U.S. 398, 403 (2006). "Officers do not need ironclad proof of 'a likely serious, life-threatening' injury to invoke the emergency aid exception." *Michigan v. Fisher*, 558 U.S. 45, 49 (2009) (per curiam). On the contrary, the medical assistance exception has been satisfied when officers saw a bloody lip, *Brigham City*, 547 U.S. at 406, or were confronted with damaged property and blood drops at the scene, *Fisher*, 558 U.S. at 46.

As discussed further below, the concerns animating these two exceptions come together to obviate the need for a warrant in the case of the unconscious impaired driver. When law enforcement has probable cause to believe that an unconscious driver is impaired, the compelling and urgent need of law enforcement to both gather evidence and care for the unconscious driver justify an exception to the warrant requirement. *See Fisher*, 558 U.S. at 49 (standard is whether there was "an objectively reasonable basis for believing" that there was an emergency). On the one hand, blood evidence of impaired driving should not be sacrificed because the unconscious driver needs medical care; on the other hand, medical care for the unconscious driver should not be delayed by the process of seeking a warrant.

To be sure, *McNeely* teaches that every case must be evaluated on the "totality of the circumstances."

But a general rule allowing warrantless blood tests of unconscious impaired driving suspects does not violate *McNeely*'s teaching that every case must be evaluated on its facts. 569 U.S. at 153. It simply recognizes that recurring facts in this pattern of cases satisfy the exigency exception. *See id.* at 175 (Roberts, J., concurring) ("pertinent facts in drunk driving cases are often the same, and the police should know how to act in recurring factual situations"). As demonstrated by exigency exceptions for emergency aid, fire, and hot pursuit, the Court's focus on the "totality of the circumstances" has left room for general rules based on generalizable facts. *E.g.*, *Michigan v. Tyler*, 436 U.S. 499, 509 (1978) (burning building); *United States v. Santana*, 427 U.S. 38 (1976) (pursuit of armed robber into home).

In the case of the unconscious driver, a blood test is necessary to avoid the destruction of evidence. At the same time, a warrant requirement unreasonably risks delaying medical care for the impaired driver. "[T]he exigencies of the situation" so presented render the warrantless blood draw objectively reasonable under the Fourth Amendment. *King*, 563 U.S. at 460.

D. It is unreasonable to require law enforcement to seek a warrant for a blood draw when an impaired driver is unconscious.

Whether viewed through the prism of consent, arrest, or exigency, "[t]he touchstone of the Fourth

Amendment is reasonableness." *Jimeno*, 500 U.S. at 250. Law enforcement officers are required to apply for a warrant only if "practicable." *Terry v. Ohio*, 392 U.S. 1, 20 (1968) ("police must, whenever practicable, obtain advance judicial approval of searches and seizures through the warrant procedure"); *see McNeely*, 569 U.S. at 174 (Roberts, J., concurring) (police must "apply for a warrant if practicable"). Likewise, it is this Court's "general preference to provide clear guidance to law enforcement through categorical rules." *Riley v. California*, 573 U.S. 373, 398 (2014). Providing police with "workable rules" requires "in large part" balancing the competing interests "on a categorical basis—not in an ad hoc, case-by-case fashion by individual police officers." *Id.* (internal quotations omitted).

Requiring law enforcement to seek a warrant when presented with an unconscious impaired driver is not reasonable, practical, or workable. Imposing a warrant requirement in this scenario risks delaying medical care and forces law enforcement to make sophisticated medical judgments that they may not be well-positioned to make, all the while risking the destruction of crucial blood evidence. Officers should not have to choose between potentially exacerbating the health condition of an unconscious person if a warrant is sought, and potentially losing evidence if no warrant is sought. *See Wayne v. United States*, 318 F.2d 205, 213 (D.C. Cir. 1963) (Burger, J. concurring) (in "checking a report of a dead, dying, or unconscious woman," if the police had "paused for a warrant with

the risk that the 'unconscious woman' might die while papers were being drawn[,] they could surely merit censure") (emphasis added).

Officers do not necessarily know why the impaired driver is unconscious, how long the driver has been unconscious, what substances the driver has taken, or if other factors have led to unconsciousness. The driver who is unconscious (as opposed to conscious) is more likely to be severely impaired and/or suffering from other serious medical problems which law enforcement cannot even detect. *See, e.g., Estate of Williams v. Cline*, 902 F.3d 643, 647 (7th Cir. 2018) (arrestee fell unconscious and died in squad car possibly from a sickle cell crisis); *Denham v. City of New Carlisle*, 741 N.E.2d 587, 593 (Ohio Ct. App. 2000) ("stuperous" bar patron who had reportedly been "unconscious" was not taken to hospital and died because he actually had suffered blunt impact injuries not just intoxication); *see also Spencer v. Abbott*, 731 F. App'x 731, 744 (10th Cir. 2017) (prisoner withdrawing from methadone was improperly diagnosed with spasms and seizure, when he actually suffered a severe stroke). The opioid epidemic has only heightened the challenges for law enforcement officers faced with medical emergencies. Katie Zezima, *As opioid overdoses rise, police officers become counselors, doctors and social workers*, WASH. POST, Mar. 12, 2017. Minutes count, particularly in cases of drug overdose, as Respondent demonstrates in its brief. Resp. Br. 54-55.

Without an exception for unconscious impaired drivers, the law will require officers to balance transportation delays, the resources required to obtain a warrant, the need to obtain evidence, and their assessment of the unconscious driver's medical condition. Petitioner downplays the burden imposed by a warrant, emphasizing that technological advances have made it easier to get one. Pet'r Br. 39-40. But unless the warrant requirement is effectively eviscerated, obtaining a warrant requires at least some commitment of time, resources, and attention.

Law enforcement should not be expected to guess whether there is enough time to get a warrant without harming the unconscious driver while at the same time providing or arranging medical care. *See* ABA Standards for Criminal Justice § 1-2.2 ("[M]ost police agencies are currently given responsibility, by design or default, to: . . . (c) aid individuals who are in danger of physical harm; . . . (f) assist those who cannot care for themselves; . . . (g) resolve conflict; . . . and (k) provide other services on an emergency basis."); *see generally Deshaney v. Winnebago Cty. Dep't of Soc. Servs.*, 489 U.S. 189, 199-200 (1989) ("When the State takes a person into its custody and holds him there against his will, the Constitution imposes upon it a corresponding duty to assume some responsibility for his safety and general well-being.").

In these circumstances, the more reasonable, clear, and workable rule is to recognize that police do not need a warrant to take a blood test when they have probable cause to believe an unconscious driver

is impaired. This clear guidance to law enforcement will protect the public by aiding prosecution of the most severely impaired drivers while also protecting drivers by facilitating prompt medical care.

CONCLUSION

For the foregoing reasons, *Amici* respectfully submit that the Wisconsin Supreme Court's judgment should be affirmed.

Respectfully submitted,

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